SUPREME COURT, U. S.

No. 165

FILED

JUL 9 1965

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1965

JOSEPH RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

FRED M. VINSON, JR.,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYHACK,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 166

JOSEPH RINALDI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a; R. 543-549) is reported at 393 F.2d 97.

JURISDICTION

The judgment of the court of appeals was entered on April 19, 1968 (R. 550). A petition for rehearing was denied on May 7, 1968. The petition for a writ of certiorari was filed on June 6, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government adequately proved violation of 18 U.S.C. 1001 (false statement to a government agency).

2. Whether statements by a co-adventurer in furtherance of an illegal joint enterprise were admissible in evidence against petitioner.

STATEMENT

In a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on six counts of a seven-count indictment charging the making of false statements in violation of 18 U.S.C. 1001, in a matter within the jurisdiction of the Immigration and Naturalization Service (R. 462-463, 469-471). On July 27, 1967, he was given concurrent sentences of imprisonment for one year (R. 476). On appeal, the conviction was affirmed (R. 550).

The evidence showed that in December 1962, petitioner agreed to assist an Italian immigrant named Caccavale to immigrate to the United States (R. 330-333). One DeGruccio, the operator of an automobile garage in New York, agreed to hire Caccavale for $50 per week with petitioner paying any additional salary required (R. 7-8). On stationery bearing a letterhead for DeGruccio's garage which petitioner ordered, petitioner sought a labor clearance on the ground that DeGruccio needed to employ a machinist with specified skills. Petitioner received a clearance order, certifying that the available American labor market could

not fill the position involved because of the special skills required (R. 52-53, 170-171, 179, 352, 344).

After obtaining the clearance order petitioner, without informing DeGruccio, prepared and submitted to the Immigration and Naturalization Service, a petition, dated February 4, 1964, purportedly signed by DeGruccio, seeking a first preference for Caccavale (Gov. Ex. 3; R. 46-47). Petitioner had forged the signature of DeGruccio to this petition (R. 46-47, 349-350). DeGruccio testified that the petition contained a number of false statements: *e.g.*, that his business had annual gross sales of from $40,000 to $50,000; that he had an average number of three employees; and that the alien's salary would be $140 per week (R. 48-49). One Italian document accompanying the petition, according to petitioner's translation, stated that Caccavale was "very adept in the making of parts and tools"; the correct translation was that Caccavale "is actually assigned to the saws for the sawing of marble" (R. 183-186). Petitioner's translation of Caccavale's Italian military record indicated that Caccavale had been an electric lathe operator and had serviced certain machines; the correct translation referred to no such duties (R. 190-193).

On May 14, 1964, the scheduled date for a hearing on the visa petition, petitioner went to DeGruccio's repair shop with an attorney named Lentini, in whose office petitioner worked (R. 10-11, 234-235, 251). During the drive to the Immigration Service offices, and again after arrival there, Lentini, in petitioner's presence, instructed DeGruccio to give answers which would conform to the information furnished by peti-

tioner on the visa petition. Lentini told DeGruccio what questions would be asked and what answers he should give (R. 20-27). Lentini and DeGruccio (not in the presence of petitioner) were then called into the hearing (R. 32). DeGruccio testified that an Immigration officer asked him a number of questions, to which Lentini gave false answers, *e.g.*, that DeGruccio's gross annual sales were from $40,000 to $50,000, that he had three employees, and that he had advertised for a machinist (R. 32-34). In the course of the hearing, after the officer indicated dissatisfaction, DeGruccio, at the suggestion of the officer and Lentini, withdrew his petition (R. 37, 39, 248-249). The present prosecution against petitioner followed.

ARGUMENT

1. Count 2 of the indictment charged that the visa petition was false in stating that Nick's Auto Shop employed three persons. Count 3, on which petitioner was acquitted, charged that the visa petition had falsely stated the address of Nick's Shop. At the close of the government's case, petitioner moved for judgment of acquittal on these two counts on the ground that the false statements were not material (R. 212-214). No claim was made that the falsity alleged in the other counts was not material.* Both the district court and the court of appeals noted the prior

* Count 1 was based on the false signature on the visa petition; Counts 4 and 5 on false statements in the application for labor clearance; and Counts 6 and 7 on falsities in the translations of the Italian documents (R. 469-471).

holdings of the Second Circuit that, under the false statement clause of 18 U.S.C. 1001, the prosecution is not required to prove materiality. *United States* v. *Silver*, 235 F.2d 375, 377 (C.A. 2), certiorari denied, 352 U.S. 880; *United States* v. *Marchisio*, 344 F.2d 653, 666 (C.A. 2); *United States* v. *McCue*, 301 F.2d 452, 456 (C.A. 2), certiorari denied, 370 U.S. 939. The court of appeals also ruled that, in any event, the false statement charged in Count 2 was material.

In view of the fact that petitioner received concurrent sentences on all counts—including those based on false statements whose materiality is unchallenged—the issue as to whether materiality must be shown is not presented by this case. Moreover, as the court below held, even as to Count 2 alone, the false statement as to the average number of employees in Nick's Auto Shop was "material" to the issue of whether a first preference visa should have been available to one whose skill was in short supply in the United States (Pet. 7a). Even in circuits which have held that materiality must be shown, the question is one for the court. *Gonzales* v. *United States*, 286 F.2d 118 (C.A. 10), certiorari denied, 365 U.S. 878; *Weinstock* v. *United States*, 231 F.2d 699 (C.A.D.C.). Since in this case the materiality of the statements is evident, there would be no occasion to reach the conflict among the circuits as to whether materiality must be proved.

2. DeGruccio's testimony regarding statements made by Lentini at the Immigration Service hearing was not inadmissible hearsay, as petitioner contends. The evidence at the trial showed that petitioner and Lentini entered into an illegal joint venture to de-

fraud the Immigration Service. During the drive to the hearing Lentini, in the presence of petitioner, coached DeGruccio to give false answers at the hearing consistent with the false answers petitioner had written in the petition. Since this evidence established that Lentini was working with petitioner as a joint venturer, Lentini's false statements in furtherance of the scheme were properly admitted in evidence against petitioner, even though no conspiracy was charged. *United States* v. *Annunziato*, 293 F.2d 373 (C.A. 2), certiorari denied, 368 U.S. 919; *United States* v. *Marchisio*, 344 F.2d 653, 668 (C.A. 2); *United States* v. *Messina*, 388 F.2d 393, 394 (C.A. 2).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

JULY 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968 312816 10